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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS, WITH BRIEF IN SUPPORT OF PETITION.

DAVID A. BUCKLEY, JR.,
Attorney for Petitioner.

LORING M. BLACK,
H. RUSSELL BISHOP,
Of Counsel.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ernest M. Bull, sole surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased, prays a Writ of Certiorari to review the decision and judgment of the Court of Claims entered March 5, 1934, dismissing petitioner's petition, filed to recover (1) the sum of $62,677.44 with interest, income tax for the period February 13, 1920, to December 31, 1920, which petitioner alleged to have been erroneously and illegally collected; and (2) the sum of $41,517.45 with interest, estate tax alleged to have been erroneously and illegally collected. Petitioner's motion for a new trial was overruled on October 15, 1934.

Questions Presented.

1. Where, after a partner's death, the partnership business is continued as provided in the partnership agreement for a certain length of time, and profits, realized from such continuation of the partnership business, are paid to the executor of deceased partner's estate in full payment of deceased partner's interest in partnership, do such profits represent taxable income to the deceased partner's estate?

2. Is not the question as to whether or not such profits represent income confined to the determination of whether or not the amount of profits received exceeded the value of the deceased partner's interest at the time of death?

3. May the value of property which has been determined to be part of the corpus of an estate, and on which a Federal Estate Tax has been paid, be subsequently subjected to the payment of an income tax?

4. May the value of property which has been expressly exempted from being included as income nevertheless be subjected to the payment of an income tax?

Statutes Involved.

Section 213 of the Revenue Act of 1918 provides:

> "That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> "(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, growing out of the ownership or use of or interest in such property; also from interest, trades, business, commerce or sales, or dealings in property, whether real or personal, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *"

"The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);"

Section 218 of the Revenue Act of 1918 provides:

"(a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

Statement.

Archibald H. Bull, a citizen and resident of Union County, New Jersey, died testate February 13, 1920. At the time of his death, decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). Said partnership was created by written agreement dated January 9, 1918, providing that the partnership was to begin on January 1, 1918, and to continue for one year from that date (R. 84). After the termination of the period provided for in the partnership agreement, the partnership continued to operate from year to year in accordance with the said agreement and without any further agreement in writing (R. 84).

Among other things, the partnership agreement provided:

"* * * that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said

profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration; and all adjustments of profits or losses shall be made as the date of such withdrawal." (R. 84.)

The first method provided was adopted by the estate and the surviving partners until December 31, 1920. At the time of decedent's death, February 13, 1920, decedent's share in the partnership profits on the business transacted from January 1, 1920, to February 13, 1920, was $24,124.20, and he had no other accumulated profits in the business (R. 84). The estate received during 1920, as that portion of the profits of the business carried on by the surviving partners, which the decedent would have been entitled to had he lived, the sum of $200,117.09. The further sum of $12,601.70 was received during the first two months of 1921, making a total of $212,718.79 received by the estate from the surviving partners (R. 84-85).

In filing an estate tax return, the executor valued decedent's interest in the partnership at $24,124.20, the amount of the decedent's share in the earnings accrued to the date of his death. The Commissioner valued such interest at $235,202.99 and subjected such value to an estate tax, which was paid in June and August of 1921 (R. 85).

On April 14, 1921, the executor filed an income tax return for the estate covering the period February 13, 1920, to December 31, 1920, which did not include as income the amount of $200,117.09, the amount received as the estate's share of the profits from carrying on the business for that period. In July, 1925, the Commissioner determined that the said sum of $200,117.09 should have been returned by the executor as income to the estate and notified the executor of a deficiency in income tax due from the estate

for the period of February 13, 1920, to December 31, 1920, of $261,212.65 made up in part of the said amount of $200,117.09 and of other adjustments not here involved. September 5, 1925, plaintiff appealed to the United States Board of Tax Appeals from the deficiency in income tax and the Board, after hearing the case on its merits, affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income and determined a deficiency of $55,116.49 with interest of $7,510.95 (7 B. T. A. 993). The said amounts totalling $62,677.44 were paid April 14, 1928 (R. 85-86).

On July 11, 1928, a claim for refund of $62,677.44 was filed by the executor on the grounds that the amount on which the tax was assessed was corpus, had properly been taxed as corpus, and in fact and in law was not income and, therefore, not subject to the payment of an income tax. The claim was rejected May 18, 1929 (R. 86).

On September 16, 1930, the executor filed his petition in the Court of Claims. The parties entered into a stipulation of facts, the executor submitted evidence, and on March 5, 1934, the Court of Claims, after making special findings of fact, entered its judgment dismissing executor's petition (R. 89). A motion for extension of time within which to file a motion for a new trial was granted on May 4, 1934, extending the time within which the plaintiff might file a motion for a new trial to thirty days from May 4, 1934 (R. 90). On July 3, 1934, the plaintiff filed a motion for a new trial, which was overruled by the Court on October 15, 1934 (R. 90).

Opinion Below.

The opinion below is reported in 6 F. Supp. 141.

The gist of the opinion below is that the amount $200,117.09 was properly subjected to the payment of an income

tax for the reason that the amount was a "gain or profit derived by the estate from the use or employment of the property belonging to the decedent at the date of his death, pursuant to an agreement between the decedent and the other partners prior to his death, to the carrying out of which the estate agreed."

Petitioner's Contentions.

The petitioner contends that the court below erred in holding that the estate was liable for the payment of an income tax on the sum of $200,117.09 received in 1920; and that, on the contrary, the estate was not so liable because:

1. The partnership agreement, properly interpreted, clearly provided for the sale of the deceased partner's interest in the partnership, and the amount received by the estate represented the purchase price of said deceased partner's interest, and, therefore, represented corpus and not income.

2. The amount received by the estate being the value of property received by bequest may not, because of the provision of Section 213 of the Revenue Act of 1918, be classed as income.

3. The amount in question having been determined to be corpus, and an estate tax having been paid thereon, it may not be subjected to the payment of an income tax.

4. The amount in question, having been received as payment for conversion of a capital asset, and not being in excess of the value of said capital asset at the date of death, could not represent a gain and, therefore, be taxable as income.

5. If the estate were liable at all for income tax on amounts received, such liability was confined to the tax

upon the profit, if any, represented by the difference between the value at the time of death as fixed by the Commissioner and the amount actually realized.

Reasons for Granting the Writ.

This case presents an important question of Federal Taxing Law, which has not been decided by this Court. There is a great contrariety of judicial opinion on the subject of the nature of the interest of the estate of a deceased partner in amounts earned by carrying on the business of the partnership, pursuant to the partnership agreement. This diversity of judicial thought is not confined to the various Circuit Courts of Appeals, but the opinions of the Board of Tax Appeals and the Court of Claims on this subject cannot be reconciled in principle. It is believed to be in the public interest that this question be settled by this Court.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Court of Claims in this case be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED,
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vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is reported in 6 Fed. Supp. 141. It is found on pages 87 to 89, inclusive, of the record.

Jurisdiction.

The judgment of the Court of Claims was entered on March 5, 1934. A motion for a new trial was filed by leave of court on July 3, 1934, which was overruled on October 15, 1934.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Sec. 3; 43 Stat. 939; 28 U. S. C. Sec. 288.

Statement.

Statements of the questions presented and of the facts in this case will be found in the petition (Petition, *ante*, pp. 2, 3-5).

Specification of Errors to Be Urged and Summary of Argument.

The statement of "Petitioner's Contentions" in the petition (Petition, *ante*, p. 6) contains specifications of the errors now urged and summarizes the argument here following:

Statutes Involved.

These are indicated in the Petition (*ante*, p. 2-3).

ARGUMENT.

Point I.

The Death of Petitioner's Testator Worked a Dissolution of the Partnership.

The death of Archibald H. Bull on February 13, 1920, dissolved the partnership of A. H. Bull & Company as then constituted. *Long* v. *Thayer*, 150 U. S. 520, 522; *Darcy* v. *Commissioner of Internal Revenue*, 66 F. (2d) 581, 584; *Matter of Lee*, 215 App. Div. 576, 577.

The respondent in the court below conceded that the death of a partner terminated the partnership relationship. There is, therefore, no dispute between the parties as to whether or not the partnership was dissolved by the death of Archibald H. Bull.

The partnership having been dissolved, the deceased partner's interest therein became an asset of his estate

and as such asset had a value which was determined by the Commissioner. It necessarily follows that whatever was received by the estate in liquidation of this capital asset was nothing more than the return of capital to the extent that it did not exceed the value at the beginning of the period.

If, for example, the estate at the time of death had sold this particular asset of the estate at the value placed upon it by the Commissioner, there is no question but that the amount received would not have represented income to the estate unless it exceeded such value.

This is the procedure which was followed here. The surviving partners acquired the entire business, goodwill, existing contracts and whatever other property belonged to the partnership at the time of death under a defined method which was set forth in the partnership agreement. In other words, by paying to the estate the profits which the deceased would have received had he lived, as provided in the agreement, the surviving partners purchased an asset of the estate. The amount received by the estate as the purchase price paid for this asset could not have been income unless the amount received had been in excess of the value placed upon the partnership interest by the Commissioner.

The relationship between the estate and the surviving partners was one of creditor and debtor. The profits which were paid by the surviving partners from time to time to the estate represented payments on the amount of the debts. When final payment was made, the relationship was terminated and the estate's interest in the partnership as constituted at the time of the death of Archibald H. Bull was extinguished.

Point II.

The Partnership Agreement Provided the Methods for Liquidating a Deceased Partner's Interest in the Partnership, and Any Property Coming to the Estate as the Deceased Partner's Interest Represented Capital and Was Part of the Corpus of the Estate.

In drawing the partnership agreement, the partners obviously had in mind the fact that the death of a partner would dissolve the partnership, and that upon such dissolution it would be necessary to value the deceased partner's interest and discharge such interest. Rather than leave such determination to the hazards of an accounting and liquidation proceeding, the partners agreed among themselves that one of two methods should be followed in determining the deceased partner's interest: the business should be carried on by the surviving partners to the end of the calendar year and the estate of the deceased partner should receive the same interests as the deceased partner would if living, or the deceased partner's estate might withdraw the deceased partner's interest within thirty days after probate of the will and all adjustments should be made as of the date of withdrawal.

The first method was adopted. The partnership business was carried on and as profits were realized from time to time, the amounts the decedent would have received if he had lived were paid to his estate. Such payments were made by the surviving partners in the purchase of a capital asset. *Hill* v. *Commissioner of Internal Revenue*, 38 F. (2d) 165, 168. *Pope* v. *Commissioner of Internal Revenue*, 39 F. (2d) 420, 424. This being true, the receipt of such payments by the estate represented the value received in the conversion of a capital asset and not income.

It would make no difference in the result if the second method had been adopted. Any amount received by the

estate under either method would have represented the value of the deceased partner's interest in the partnership—that is, a capital asset.

The court below has entirely misconstrued the purpose of that part of the agreement relating to a deceased partner's interest. It states (Opinion, R. 89):

> "When considered in connection with the nature of the business, the agreement which was made at the time the partnership was first formed, shows that its purpose was to provide a method whereby the business would not be suddenly disrupted in the event of death of any of the partners by immediate withdrawal of accumulated funds by the estate, possible necessity of change in name, or a controversy with respect to matters of accounting."

Such an interpretation of the purpose of the agreement entirely overlooks the fact that if the second method had been adopted that all of the contingencies supposed to have been provided against would have happened with the possible exception of "a controversy with respect to matters of accounting." If the partners had had in mind what the court attributes to them, the second method would never have been included in the agreement.

In carrying on the new partnership, certain profits were realized, and the estate received the same share of these profits as the decedent would have received if he had lived. In so far as the surviving partners were concerned, these profits represented income; in so far as the estate was concerned, it represented capital, an amount received in liquidation of a capital asset.

In *United States* v. *Wood et al.*, 8 Fed. Supp. 939, Eastern District of Pennsylvania, reported January 21, 1935, the court had under consideration a case with facts analagous to the facts in the pending case. In deciding that case, the

District Court, speaking through Judge Dickinson, summed up the facts as follows:

> "Defendant's decedent was a member of a partnership. Had he lived, it may be assumed that a sum representing his share of partnership profits would have been allotted to him at the first of the year following the date of his death. At the time of his death, such allotment had not been made, although in the offing. The regular time for the closing of the books was the end of the year. The decedent died February 17, 1926. When the books were closed in December, 1926, it became known that decedent's share of the profits from the last profit-sharing date to the date of his death was the sum for which suit is brought. This sum was included in the value of his estate as principal, and death taxes paid thereon. The United States now claims it was income and taxable as such."

In its conclusion, the court stated:

> "The fallacy which underlies the whole argument is that the nature of what a thing is can be changed by changing the name by which you choose to call it; in other words, anything can be made income by the simple expedient of calling it by that name. The underlying inquiry is, What is an interest in a partnership? It is nothing more nor less than the right to call upon the copartners for an accounting. The sole right of the representative of a deceased partner is to call upon the surviving partners to account for the assets of the partnership in their hands. There might have been gains or losses, and almost surely both gains and losses, with a net result one way or the other. A balance could be struck in favor of or against the deceased partner. If in his favor, it might be made up of the accumulations of undistributed profits for many years. It might develop that the profits of the last year's business made up the whole balance; the business up to the last year showing in the red. In the settlement of the decedent's estate, his interest in the partnership would be inven-

toried at its appraised value. His executor would be chargeable with what he received for it. The question is whether the decedent's estate would in either of the events we have instanced be chargeable with an income tax on the sum eventually received from the partnership as income received by him. That it was part of his estate, and taxable as such, could readily be found, but that what the value of his partnership interest turned out to be was income which the decedent had received and upon which he owed an income tax is a thought difficult to grasp. * * * Furthermore a law which imposes a tax on income imposes no tax on what is not income, and the interest of a deceased partner in a firm, while it is part of his estate is not taxable income within the meaning of the income tax laws, nor is any part of it. * * * A partnership is an entity. It may have received gains, but those gains (or his proportionate share of them) do not become income to the individual partner until set apart to, and received by, him. Before that they are income to the partnership but not income to the individual partners. If the partnership is dissolved by the death of a partner, the sole right of the estate of the deceased partner, as we have already said, is to require the surviving partners to account for the share of the decedent in the partnership assets. That share is part of his estate but is assuredly not income. * * *

Accepting the doctrine that a partner's share of partnership profits is taxable income, whether distributed or not, the share of profits may be said to be income because it is income. When, however, a partner's share in a dissolved partnership is ascertained by the difference between what is realized from its assets and the sum of its debts, how can such a balance be held to be income?

The whole argument may be summed up in this very narrow distinction. If a sum of money comes to a decedent's estate from a partnership of which the decedent was a member as money to which the decedent in his lifetime had a right as income, it is income upon

which a tax may be assessed against a decedent's estate precisely as it might have been assessed against him had he lived. If, however, the sum received represents the share of the decedent in the assets of the partnership, it is principal, and no part of it is made income to the decedent by the mere fact that included in the assets were moneys which came to the firm as profits. To express this thought in the concrete, if the partnership had made profits his share in which was demandable by a partner, such sum would be income to the individual partner, but, if the firm was dissolved, then the share of each partner in the net assets would not be income to him, notwithstanding the fact that the assets included what were profits to the firm."

See also *United States* v. *Carter et al.*, C. C. A. 19 F. (2d) 121, where the court had under consideration the question of the interest of the deceased's estate in the partnership of which he was a member at the time of his death and held such interest in the partnership not taxable as income; that what the executors received came to them as part of the *corpus* of the estate of the deceased.

In *Matter of Lee*, 215 App. Div. (N. Y.) 576, the court had under consideration the question of whether or not an estate had received income and was liable for the payment of income tax where the estate had received an amount equal to the share of the net profits, for a certain period, which a deceased partner would have received if living, as payment of deceased partner's interest in the firm. In deciding this question, the court said at page 578:

"The sum so paid was in no sense income. 'Income may be defined as the gain derived from capital, from labor or from both combined.' (*Eisner* v. *Macomber*, 252 U. S. 189.) The estate had no capital invested in the new partnership. It had no interest in the business of the partnership; in its profits or in its losses. Certainly, it performed no labor in connection therewith.

> There was nothing of which the sum paid was the 'outcome' to those who paid it, or 'income' to those who received it. It was a capital sum paid to purchase and extinguish the interest of George C. Lee at the time of his death in the good will of the old partnership. It was not a sum properly constituting a basis for the income tax imposed and paid."

Income tax on the profits was payable by and only by the surviving partners, for they were the only ones to whom it was income.

There exists no authority in law for subjecting one person to the payment of another's tax. This Court in disposing of a similar question has stated:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income." *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, 215.

Point III.

The Amount, Being the Value of Property Received by Bequest, May Not Be Taxed as Income Because of Statutory Exemption.

Section 213 (b) (3) of the Revenue Act of 1918 provided that "the value of property acquired by gift, bequest, devise or descent" shall not be considered as gross income. The value of the petitioner's testator's interest in the partnership of A. H. Bull & Company was the value of property acquired by bequest.

Upon the testator's death, his interest in the partnership, together with all other personal property belonging to him, vested in his executor; but, at the same time, the right to receive this property vested in the legatees named in his will, and, therefore, the value of the partnership interest, the same as any other personal property interest passing under the will, came to the legatees by bequest.

Brewster v. *Gage*, 280 U. S. 334.

The respondent in the court below contended that the property was not received by bequest, because title to it first vested in the executors. This contention is fallacious, as is shown by the decision in *Brewster v. Gage, supra,* wherein the Court says:

> "The decree of distribution confers no new right; it merely identifies the property remaining, evidences the right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

The exemption provided by the statute is clear and any attempt to narrow this exemption has been condemned by this Court. In *Burnett* v. *Whitehouse,* 283 U. S. 148, the Court, speaking through Mr. Justice McReynolds, said at page 151:

> "The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219."

To say that the amount in question was not the value of property received by bequest is to disregard substance and give undue importance to form. It amounts to stating that beneficiaries do not own property, the naked title to which is temporarily in a trustee.

Point IV.

Having Once Been Determined to Be Corpus and an Estate Tax Having Been Paid Thereon, the Amount in Question May Not Be Subjected to an Income Tax.

As before stated (Petition, *ante,* p. 4) the Commissioner determined that the amount received by the estate from the surviving partners represented a part of the corpus of the estate and assessed thereon an estate tax which was paid.

The Commissioner was correct in determining that the

property in question was corpus as it cannot be disputed that the interest of the estate in the partnership was an asset of the estate. The Commissioner determined the value thereof and such amount represented the value of decedent's interest in the partnership, which was clearly as much a part of the corpus of his estate as any other property, tangible or intangible, real or personal, which the decedent owned at the time of his death.

The Revenue Act of 1918, Section 402, provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate, and the expenses of its administration, and is subject to distribution as part of his estate." Thus, by statutory definition, the partnership interest was part of the corpus of the estate. It was subject to the payment of charges against his estate; it was subject to the expenses of administration of his estate; and it was subject to distribution as part of his estate.

Having once been properly classed as corpus, the asset in question could not be classed as income and any profit upon the sale or liquidation thereof is limited to the excess of the value at the time of death, as determined by the Commissioner.

> "When, therefore, an item is properly determined to constitute part of the gross estate of a decedent for estate tax purposes, it cannot by any sort of reasoning be made to constitute a part of the income of the same estate. It is a part of the corpus."
>
> *Nichols* v. *U. S.*, 64 C. Cls. 241, 245.

To further subject the amount to the payment of an income tax would amount to double taxation, against which

there exists a strong presumption, except where the language of the statute clearly calls for such double taxation. Said the Court in *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, pp. 195, 196:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax upon the proceeds of the two policies in this case over and above $40,000 that is an income tax and an estate tax. Such a duplication even in an exigent war tax measure is to be avoided unless required by express words."

POINT V.

The Amount in Question Being Less Than the Value of the Property as of the Date of Death as Determined by the Commissioner, There Was No Gain Upon Which to Levy Any Income Tax.

The amount received by the executor from the surviving partners was not greater than the value placed upon the partnership interest by the Commissioner. The rule that there must be a gain before there can be any taxable income is elementary.

> "In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 184, 185.

> "Generally speaking, the income tax law is concerned only with realized losses as with realized gains." *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

The Commissioner placed a value upon the deceased partner's interest in the partnership as constituted at the date of death. This was a value placed upon a capital asset which was acquired by the surviving partners as herein-

before stated. Unless the amount received had exceeded the value placed upon the asset by the Commissioner, there was no income. There could be no income unless there was a gain. What the estate received was merely a return of capital which did not quite equal the value placed upon it by the Commissioner at the beginning of the period.

Since there was no gain, the only basis upon which an income tax could have been levied is wholly wanting and the Commissioner erred in levying an income tax and the court below erred in sustaining the imposition of the income tax.

Conclusion.

The decision of the Court of Claims is wrong. The writ of certiorari should be granted, and upon a final hearing the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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(5861-C)

PETITIONERS' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 649.

ERNEST M. BULL, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased,
Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Claims is reported in 6 Fed. Supp. 141. It is found on pages 87 to 89, inclusive, of the record.

JURISDICTION.

The judgment of the Court of Claims was entered on March 5, 1934 (R. 82). A motion for a new trial was filed by leave of Court on July 3, 1934, which was overruled on October 15, 1934 (R. 90). Petition for writ of certiorari

was filed January 15, 1935, and the writ was granted March 4, 1935.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Sec. 3(b); 43 Stat. 939; 28 U. S. C. Sec. 288.

QUESTIONS PRESENTED.

1. Where, after a partner's death, the partnership business is continued as provided in the partnership agreement for a certain length of time, and profits, realized from such continuation of the partnership business, are paid to the executor of deceased partner's estate in full payment of deceased partner's interest in partnership, do such profits represent taxable income to the deceased partner's estate?

2. Is not the question as to whether or not such profits represent income confined to the determination of whether or not the amount of profits received exceeded the value of the deceased partner's interest at the time of death?

3. May the value of property which has been determined to be part of the corpus of an estate, and on which a Federal Estate Tax has been paid, be subsequently subjected to the payment of an income tax?

4. May the value of property which has been expressly exempted from being included as income nevertheless be subjected to the payment of an income tax?

STATUTES INVOLVED.

Section 213 of the Revenue Act of 1918 provides:

> "That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> "(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, growing out of the ownership or use of or interest in such property; also from interest, trades, business, commerce or sales, or dealings in property, whether real or personal, rent,

dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *"

"The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);"

Section 218 of the Revenue Act of 1918 provides:

"(a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

STATEMENT.

Archibald H. Bull, a citizen and resident of Union County, New Jersey, died testate February 13, 1920. At the time of his death, decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). Said partnership was created by written agreement dated January 9, 1918, providing that the partnership was to begin on January 1, 1918, and to continue for one year from that date (R. 84). After the termination of the period provided for in the partnership agreement, the partnership continued to operate from year to year in accordance with the said agreement and without any further agreement in writing (R. 84).

Among other things, the partnership agreement provided:

"* * * that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the

usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal." (R. 84.)

The first method provided was adopted by the estate and the surviving partners until December 31, 1920. At the time of decedent's death, February 13, 1920, decedent's share in the partnership profits on the business transacted from January 1, 1920, to February 13, 1920, was $24,124.20, and he had no other accumulated profits in the business (R. 84). The estate received during 1920, as that portion of the profits of the business carried on by the surviving partners, which the decedent would have been entitled to had he lived, the sum of $200,117.09. The further sum of $12,601.70 was received during the first two months of 1921, making a total of $212,718.79 received by the estate from the surviving partners. (R. 84-85)

In filing an estate tax return, the executor valued decedent's interest in the partnership at $24,124.20, the amount of the decedent's share in the earnings accrued to the date of his death. The Commissioner valued such interest at $235,202.99 and subjected such value to an estate tax, which was paid in June and August of 1921 (R. 85).

On April 14, 1921, the executor filed an income tax return for the estate covering the period February 13, 1920, to December 31, 1920, which did not include as income the amount of $200,117.09, the amount received as the estate's share of the profits from carrying on the business for that period. In July, 1925, the Commissioner determined that the said sum of $200,117.09 should have been returned by the executor as income to the estate and notified the executor of a deficiency in income tax due from the estate for the period

of February 13, 1920, to December 31, 1920, of $261,202.65 made up in part of the said amount of $200,117.09 and of other adjustments not here involved. September 5, 1925, plaintiff appealed to the United States Board of Tax Appeals from the deficiency in income tax and the Board, after hearing the case on its merits, affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income and determined a deficiency of $55,116.49 with interest of $7,510.95 (7 B. T. A. 993).. The said amounts totalling $62,677.44 were paid April 14, 1928 (R. 85-86).

On July 11, 1928, a claim for refund of $62,677.44 was filed by the executor on the grounds that the amount on which the tax assessed was corpus, had properly been taxed as corpus and in fact and in law was not income and, therefore, not subject to the payment of an income tax. The claim was rejected May 18, 1929 (R. 86).

On September 16, 1930, the executor filed his petition in the Court of Claims. The parties entered into a stipulation of facts, the executor submitted evidence, and on March 5, 1934, the Court of Claims, after making special findings of fact, entered its judgment dismissing executor's petition. (R. 89.) A motion for extension of time within which to file a motion for a new trial was granted on May 4, 1934, extending the time within which the plaintiff might file a motion for a new trial to thirty days from May 4, 1934 (R. 90). On July 3, 1934, the plaintiff filed a motion for a new trial, which was overruled by the Court on October 15, 1934 (R. 90).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Claims erred:

1. In holding that the partnership agreement did not provide for the sale of a deceased partner's interest to the surviving partners.

2. In holding that the payments made to the estate represented gains or profits derived from the use of property belonging to the estate.

3. In failing and refusing to hold that the payments made to the estate represented a return of capital.

4. In failing and refusing to hold that the imposition of the income tax was double taxation.

5. In holding that the payments made to the estate were taxable income.

SUMMARY OF ARGUMENT.

The death of the petitioner's testator dissolved the partnership of A. H. Bull & Company as constituted at the date of death, and his interest in the partnership became a capital asset of his estate. The partnership having been dissolved, the duty devolved upon the surviving partners to pay to the executor of the deceased partner for the deceased partner's interest and a concurrent duty devolved upon the executor to collect the deceased partner's interest as a part of the duty devolving upon him to collect all property belonging to the decedent and passing under his will. The partnership agreement provided for a sale contingent upon death of a deceased partner's interest as an asset to the survivors constituting a new partnership, the members of which were obligated to pay the purchase price required by such sale.

The partnership agreement provided, in the case of the death of a partner, a choice of two methods to be followed in the liquidation of the interest of a deceased partner. One of these methods must be followed, and it was the executor's right to elect which method would be adopted, and he accordingly made his choice. The surviving partners were jointly and severally bound by the election of the executor as to the method and were obliged to pay out to the executor whatever amount was due by adopting the elected method.

The amount received was, under the income tax laws, merely a return of capital. If there is one principal of income tax law which may be taken as axiomatic, it is the principal that where there is no gain there is no income, and that where a conversion of a capital asset takes place, there can be no gain until after the value of the capital asset has been received, the value of such capital asset being its value at the beginning of the period under consideration. In other words, there is no income without gain and there is no possibility of gain until there has been a return of capital; therefore, when there has been a conversion of a capital asset and the amount received at the end of the period does not exceed the value of the said asset at the beginning of the period, there is no gain and therefore no income.

Moreover, the amount received was merely the value in money, of property received by bequest and sold immediately upon receipt. The value of property received by bequest is expressly exempt from being considered as income. The exemption applies to the value of the property received, and in this instance, less than the value at the beginning of the period, was received. This would clearly bring the amount received within the exemption.

The estate's claim against the partnership was corpus; just as much as any other piece of property passing under the will of the testator and could not at the same time be income. As such corpus it was properly subjected to payment of an estate tax, which is merely a transfer tax, and a tax which may only be levied upon that part of a decedent's property which is corpus.

The amounts received by the estate in liquidation of its claim cannot be transformed into income merely by calling it income. In order to be taxable as income under the taxing statutes it must, in truth, and reality, be income and must conform to that definition of income which has been developed over a long period of years by this Court

and the lower federal courts. It is fundamental that the return arising from the conversion of capital, becomes income only when and to the extent that it exceeds the value of the property from which it is derived. If the contention of the Government that the amount received represents income derived from the use of property in the partnership business, is correct, then *Eisner* v. *Macomber*, 252 U. S. 189, and all the cases following it and adopting its definition of income must be jettisoned.

ARGUMENT.

POINT I.

The Death of Petitioner's Testator Dissolved the Partnership and Capitalized Any Interest Which the Decedent Had in the Partnership.

The death of Archibald H. Bull on February 13, 1920, dissolved the partnership of A. H. Bull & Company as then constituted.

The respondent in the court below conceded that the death of a partner terminated the partnership relationship. There is, therefore, no dispute between the parties as to whether or not the partnership was dissolved by the death of Archibald H. Bull.

The partnership having been dissolved, the deceased partner's interest therein became an asset of his estate and as such asset had a value which was determined by the Commissioner. Since the petitioner's death had the effect of capitalizing all the property which he owned at the time of his death, this interest in the original partnership became capital, and as such capital and not as income it was received by the estate. The procedure which was followed in this case was that the surviving partners acquired the entire business, goodwill, existing contracts and whatever other property belonged to the partnership at the time of death under a defined method which was set

forth in the partnership agreement. In other words, by the obligation to pay the estate a sum measured by the profits which the deceased would have received had he lived, as provided in the agreement, the surviving partners purchased an asset of the estate. The amount received by the estate as the purchase price paid for the asset could not have been income unless the amount received had been in excess of the value placed upon the partnership interest by the Commissioner.

In Matter of Lee, 215 App. Div. (N. Y.) 576, the court had under consideration the question of whether or not an estate had received income and was liable for the payment of income tax where the estate had received an amount equal to the share of the net profits, for a certain period, which a deceased partner would have received if living, as payment of deceased partner's interest in the firm. In deciding this question, the court said at page 578:

> "The sum so paid was in no sense income. 'Income may be defined as the gain derived from capital, from labor or from both combined.' (*Eisner* v. *Macomber*, 252 U. S. 189.) The estate had no capital invested in the new partnership. It had no interest in the business of the partnership; in its profits or in its losses. Certainly, it performed no labor in connection therewith. There was nothing of which the sum paid was the 'outcome' to those who paid it, or 'income' to those who received it. It was a capital sum paid to purchase and extinguish the interest of George C. Lee at the time of his death in the good will of the old partnership. It was not a sum properly constituting a basis for the income tax imposed and paid."

The relationship between the estate and the surviving partners was one of creditor and debtor. The sums which were paid by the surviving partners from time to time to the estate were payments on the amount of this debt.

The legal effects flowing from a similar state of facts was set out with great care by Judge Dickinson sitting

in the District Court for the Eastern District of Pennsylvania in the case of the *United States* v. *Wood, et al.*, 8 F. Supp. 939. The Court summed up the facts as follows:

> "Defendant's decedent was a member of a partnership. Had he lived, it may be assumed that a sum representing his share of partnership profits would have been allotted to him at the first of the year following the date of his death. At the time of his death, such allotment had not been made, although in the offing. The regular time for the closing of the books was the end of the year. The decedent died February 17, 1926. When the books were closed in December, 1926, it became known that decedent's share of the profits from the last profit-sharing date to the date of his death was the sum for which suit is brought. This sum was included in the value of his estate as principal, and death taxes paid thereon. The United States now claims it was income and taxable as such." (p. 940).

In its conclusion, the court stated:

> "The fallacy which underlies the whole argument is that the nature of what a thing is can be changed by changing the name by which you choose to call it; in other words, anything can be made income by the simple expedient of calling it by that name. The underlying inquiry is, What is an interest in a partnership? It is nothing more nor less than the right to call upon the copartners for an accounting. The sole right of the representative of a deceased partner is to call upon the surviving partners to account for the assets of the partnership in their hands. There might have been gains or losses, and almost surely both gains and losses, with a net result one way or the other. A balance could be struck in favor of or against the deceased partner. If in his favor, it might be made up of the accumulations of undistributed profits for many years. It might develop that the profits of the last year's business made up the whole balance; the business up to the last year showing in the red. In the settlement of the decedent's estate, his interest in

the partnership would be inventoried at its appraised value. His executor would be chargeable with what he received for it. The question is whether the decedent's estate would in either of the events we have instanced be chargeable with an income tax on the sum eventually received from the partnership as income received by him. That it was part of his estate, and taxable as such, could readily be found, but that what the value of his partnership interest turned out to be was income which the decedent had received and upon which he owed an income tax is a thought difficult to grasp. . . . Furthermore a law which imposes a tax on income imposes no tax on what is not income, and the interest of a deceased partner in a firm, while it is part of his estate is not taxable income within the meaning of the income tax laws, nor is any part of it. . . . A partnership is an entity. It may have received gains, but those gains (or his proportionate share of them) do not become income to the individual partner until set apart to, and received by, him. Before that they are income to the partnership but not income to the individual partners. If the partnership is dissolved by the death of a partner, the sole right of the estate of the deceased partner, as we have already said, is to require the surviving partners to account for the share of the decedent in the partnership assets. That share is part of his estate but is assuredly not income. . . .

"Accepting the doctrine that a partner's share of partnership profits is taxable income, whether distributed or not, the share of profits may be said to be income because it is income. When, however, a partner's share in a dissolved partnership is ascertained by the difference between what is realized from its assets and the sum of its debts, how can such a balance be held to be income?

"The whole argument may be summed up in this very narrow distinction. If a sum of money comes to a decedent's estate from a partnership of which the decedent was a member as money to which the decedent in his lifetime had a right as income, it is income upon which a tax may be assessed against a decedent's estate precisely as it might have been as-

sessed against him had he lived. If, however, the sum received represents the share of the decedent in the assets of the partnership, it is principal, and no part of it is made income to the decedent by the mere fact that included in the assets were moneys which came to the firm as profits. To express this thought in the concrete, if the partnership had made profits his share in which was demandable by a partner, such sum would be income to the individual partner, but, if the firm was dissolved, then the share of each partner in the net assets would not be income to him, notwithstanding the fact that the assets included what were profits to the firm." (p. 941).

POINT II.

The Partnership Agreement Provided the Methods of Liquidating a Deceased Partner's Interest and Any Property Coming to the Estate in Payment of the Deceased Partner's Interest Represented Capital and Was Part of the Corpus of the Estate.

In drawing the partnership agreement, the partners obviously had in mind the fact that the death of a partner would dissolve the partnership, and that upon such dissolution it would be necessary to value the deceased partner's interest and to discharge such interest. Rather than leave such determination to the hazards and expense of an accounting and liquidation proceeding, the partners agreed among themselves that one of two methods should be followed in determining the deceased partner's interest: the business should be carried on by the surviving partners to the end of the calendar year and the estate of the deceased partner should receive the same interests as the deceased partner would if living, or the deceased partner's estate might withdraw the deceased partner's interest within thirty days after probate of the will and all adjustments should be made as of the date of withdrawal.

The surviving partners and the executor agreed to use the first method. In accordance with such agreement, the

surviving partners carried on the business and the executor did not demand an immediate accounting from the surviving partners.

This business was carried on by a new partnership composed of the surviving partners. The estate was not a member of the new partnership; it merely received from the new partnership payments in the liquidation of a capital asset. The members of the new partnership being jointly and severally obligated to make these payments.

The Court of Claims in the course of its opinion states:

> "The language of the agreement shows clearly, we think, that the estate of a deceased partner, if it elected not to withdraw the decedent's interest immediately, was to give up no rights with respect to the property of the deceased in the business at the date of death if profits should be earned by the continuance of the business by the surviving partner, or partners, for the remainder of the calendar year." (R. 88).

This statement by the Court is correct in part and erroneous in part. The estate did not give up any rights it had in deceased partner's interest at the date of death, but it did agree with the surviving partners that the only right it had, was a right to the payment of an amount equal to that proportion of the profits which the deceased would have been entitled to receive had he lived. This method of liquidating the deceased partner's interest was not dependent upon the earning of profits by the new partnership, if none had been earned the value of the estate would have been that much less. The executor could not agree to follow the one method and then at the end of the year, if he should learn that there were no profits, disaffirm the agreement and ask for a settlement under the other method. The estate took its chances, and having received its proportionate share of the profits for the agreed period, its interest was entirely liquidated and it had no further claim on the surviving partners. The estate could

only have sued as a creditor and had none of the rights, remedies or obligations of a partner.

The payments made to the estate were payments made in the purchase of a capital asset.

In *Hill* v. *Commissioner of Internal Revenue*, 38 F. (2d) 165, (C. C. A. 1st), cert. denied 281 U. S., 761; and in *Pope* v. *Commissioner of Internal Revenue*, 39 F. (2d) 420 (C. C. A. 1st) the court had under consideration similar cases, where it was agreed by the partners that on the death of a partner the surviving partners should acquire the interest of the deceased partner by paying to his estate an amount measured by the amount of profits which the deceased partner would have received had he lived. In both cases the Court held that the death of a partner dissolved the partnership and that the amount paid by the surviving partners to the estate of the deceased partner were payments made in the purchase of a capital asset.

The Government in its Brief in Opposition (p. 6) states that since in the cases cited, the partnership agreement specifically provided that the surviving partners should acquire an asset in return for a share of profits, that the cases are clearly distinguishable from the present case. The distinction lies not in the agreements made but in the form in which they were drafted. In the two cases cited the agreements were drawn with great care; in this case it was not. It is elementary that an agreement is what it is, not what it may be called, nor what it may at first glance seem to be. A lease is a lease, whether it be labelled a mortgage or quit claim deed, and a sale is a sale, however, inartificially the agreement of sale may be drawn. The agreement, no matter what its form, could not continue a partnership in contravention of law and could not create a taxable income for which no law provided.

The absurdity of the Government's contention may be seen if pushed to its logical extreme. If the payments received by the estate were income, and not a return of capital, then at the end of the period, when both the exe-

cutor and the surviving partners thought that there had been a complete discharge of their respective rights and liabilities, the deceased partner's interest remained exactly as it was at the beginning of the period, for the estate had merely received income on that interest, and the capital asset, the deceased partner's interest, remained intact, an asset of the estate which must be collected, a debt of the surviving partners which still must be paid.

POINT III.

The Amount in Question, Being An Amount Received in Conversion of a Capital Asset, Could Not Be Income Unless It Exceeded the Value of the Asset at the Beginning of the Period.

The Income Tax Law imposes a tax on income, and can reach nothing that is not income.

Since the passage of the first Federal Income Tax Statute, the courts have been unanimous in holding that the income tax applies only to income, and that unless the amount sought to be subjected to the tax is clearly income then the tax may not be imposed.

What is income and what is not has been time and again considered by this Court and the Circuit Courts of Appeals. The classic definition is the one found in *Eisner* v. *Macomber*, 252 U. S. 189, 207:

> "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

That definition has been "adhered to and applied repeatedly" *Bowers, Collector* v. *Kerbaugh Empire Company*, 271 U. S. 170, 174.

From this definition it is readily apparent that the first requisite to produce income is that there must be a gain. It is the *gain* derived from capital, from labor, or from

both combined, *not the capital or labor* from which it is derived which stamps it as income, and it is the *profit* gained through a sale or conversion of a capital asset which produces income not the sale or conversion. In short, there is no income unless there is a gain or profit.

In discussing the question of what is or is not income for the purposes of taxation the Court of Appeals for the District of Columbia in *Drier* v. *Helvering, Commissioner of Internal Revenue*, 72 F. (2d) 76, 77, said:

> "The Supreme Court has said that income is the gain derived from capital, from labor, or from both combined, and is to be taken to include profit gained through a sale or conversion of capital assets, *Eisner* v. *Macomber*, 252 U. S. 189, 207. And likewise that the income tax law is concerned only with realized gains. *Lucas* v. *American Code Company*, 280 U. S. 445, 449. This we take to mean that no income accrues unless there is gain or profit. Hence it is not every conversion of capital assets that produces income. 'In order to determine whether there has been gain or loss, and the amount of the gain if any, we must withdraw from the gross proceeds an amount, sufficient to restore the capital value that existed at the commencement of the period under consideration.' *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185."

And this Court in deciding that a certain transaction did not result in income said in the course of its opinion per Butler J., in *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 175, in effect stating the lack of such gain or profit was a clear indication that there was no income:

> "The transaction here in question did not result in gain from capital and labor, or from either of them, or in profit gained through the sale or conversion of capital."

In the present case if there was any income earned by the estate it must have been gain derived from capital or from the profit made through a sale of capital assets for

the element of labor is entirely lacking. The estate did not perform labor.

No income is derived from capital or from the sale or conversion of a capital asset, unless the value of the capital asset at the end of the period exceeds the value at the beginning of the period.

The question of income arising from gain through the sale or conversion of a capital asset was dealt with by this Court in the October term of 1920 in a series of four cases—*Merchants Loan & Trust Company* v. *Smietanka*, 255 U. S. 509; *Eldorado Coal & Mining Company* v. *Mager*, 255 U. S. 522; *Goodrich* v. *Edwards*, 255 U. S. 527, and *Walsh* v. *Brewster*, 255 U. S. 536.

In *Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, it was determined by the Court that *profit* realized by the sale of corporate stock is income, which profit was measured by the difference between the amount realized from the sale of the stock in 1917 less the capital investment as of March 1, 1913.

Eldorado Coal & Mining Company v. *Mager*, 255 U. S. 522, presented the same question and was decided upon the authority of *Merchants' Loan & Trust Company* v. *Smietanka, supra.*

Goodrich v. *Edwards*, 255 U. S. 527, dealt with the question of loss and gain on the sale of certain stocks, and the Court in deciding this case, after quoting the definition of income, found in *Eisner* v. *Macomber*, 252 U. S. 189, 207, said at page 535:

> "It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor and * * * since no gain was realized on this investment by the plaintiff-in-error, no tax should have been assessed against him."

Walsh v. *Brewster*, 255 U. S. 536, dealt with the question of gain on the sale of certain bonds. In reaching its decision the Court said:

"It is stipulated that the market value of these bonds on March 1, 1913, was $164,480.00, and the Collector assessed the tax upon the difference between the selling price and this amount, but since the gain to the taxpayer was only the difference between his investment of $231,300.00, and the amount realized by the sale $276,150.00, under authority of No. 663, *Goodrich* v. *Edwards, Collector,* this day decided, he was taxable only on $44,850.00.

The District Court, however, held that any gain realized by the sale was a mere conversion of capital assets, and was not income, which could lawfully be taxed. In this respect the Court fell into error. The tax was properly assessed, but *only upon the difference between the purchase and the selling price of the bonds, as stated.*" (Italics supplied.)

The early recognition by this Court in the cases just cited of the fact that there was no gain realized in the sale or conversion of the capital asset until there had been a return of capital, has been consistently adhered to. It was re-affirmed in *McLaughlin* v. *Alliance Insurance Company,* 286 U. S. 244.

The application of these principles in a case involving a partnership interest is aptly illustrated in the case of *United States* v. *Carter, et al.,* 19 F. (2nd) 121 (C. C. A. 5). In that case the estimated fair value of the deceased partner's interest was returned for estate tax purposes. The actual value of that interest was subsequently determined to be in excess of the estimated fair value and the Commissioner attempted to assess an income tax upon the difference between the estimated value and the actual value on the theory that such difference represented income. The Court, in deciding that such increase did not represent income, said:

"The item in question was an integral part of the corpus of the estate, received and retained by the executors, not a gain or profit issuing and severed from a capital asset. It does not include any earnings or rev-

enue produced by capital after it came into the possession of the executors. It is not taxable as income, on the ground that it is the difference between the value of property at the time it was acquired and a higher value at which it was sold or otherwise disposed of. Being merely the amount of the difference between the estimated and actual value of an asset, which remains unconverted or undisposed of, it does not represent a profit or gain which is taxable as income."

The same rule would apply here. In this case the amount received did not equal the value placed upon the asset by the Commissioner. If the difference between estimated value and actual value would not be income it is manifest that the amount received in the liquidation of an asset which did not equal the value for estate tax purposes would not be income.

POINT IV.

Unless the Amount in Question was Income to the Estate, the Estate was Not Liable for the Payment of An Income Tax Upon the Said Amount. Income is Taxable Only to Those Persons to Whom It is Income.

In this case the estate received from the surviving partners certain moneys which had been profits earned by the business in which the new partnership was engaged. There is no question that these payments were made out of money, which, at one time, represented income. It represented income in the hands of the partners of the new partnership, because it was the profits which they had received from carrying on its business. It never represented income to the estate because the estate received it in exchange for a capital asset. It was the new partnership quid for the quo of the estate. The Government in its Brief in Opposition states on page 7:

"In the case at bar, the profits received by the estate would have been taxable to the decedent had he

> lived, and are income taxable to the estate, which stands in the decedent's place."

Such a proposition is fallacious. This litigation does not involve what would have happened had the decedent lived, but is concerned with what happened because he died. The estate does not stand in the decedent's place. It is a separate taxable entity, *Anderson* v. *Wilson,* 289 U. S. 20; *Long* v. *Commissioner,* 289 U. S. 109, and the taxing statutes are concerned only with the tax liability of the entity which they seek to tax. They are concerned, not with hypotheses, but with facts. Speculation as to who would have been taxable and to what extent in the event the facts had been different is fruitless.

As the Court of Appeals for the Eighth Circuit recently said in *Hartley* v. *Commissioner of Internal Revenue,* 72 F. (2d) 352 at page 355:

> "The important consideration is that the statutes establish or recognize certain entities for income taxation purposes—one of these being an estate of a decedent during administration and settlement—and the measure prescribed for determining taxable income arising from gains or losses through sale or other realization upon property by such an entity is confined to such gains or losses accruing to such entity and no other; they are not concerned with what has happened before the property became that of the entity being taxed."

Waud v. *United States,* 71 Ct. Cls. 567, may easily be distinguished from the case at bar. In the Waud case the decedent had until his death by agreement with other heirs received one-half of the net income of a trust estate created by his father's will, and after his death his estate received this income until the expiration of a certain period. The Commissioner assessed an estate tax on the value of the right to receive this income and subjected the estate to an

income tax upon the amount of income received from the trust estate. What the estate received was clearly income; not income because it would have been income in the hands of the decedent, in whose place the estate might be said to stand, but income because it was the amount earned by certain trust funds, which amount was received by the Trustee as income and paid to the beneficiaries as income. The fact that in the same case an estate tax had been levied upon the right to receive this income, has no bearing upon the present case, because at the end of the period in which the estate was to receive income, the corpus would still be intact. In the present case the corpus had been translated into money at the end of the period and was no greater than its value at the beginning of the period.

Similarly, *Irwin* v. *Gavit,* 268 U. S. 161, may be distinguished from the present case, for in that case income from a fund in trust was bequeathed for a period of years. The decision of the Court went upon the fact that the bequest was purely one of income and that the provision of the act exempting bequests from being considered as gross income "assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income, properly so-called, simply because of a severance between it and the principal fund." (p. 167).

The Revenue Act of 1918 provides that there shall not be included in gross income:

> "The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);" Section 213 (b) (3).

It matters not that the amount in question was income when earned by the surviving partners. "Incomes are taxed to and as the statutes provide, their terms and not analogies control." *Saenger* v. *Commissioner of Internal Revenue,* 69 F. (2d) 631, 632. Income tax on the profits

was payable by and only by the surviving partners for they were the only ones to whom it was income. There exists no authority in law for subjecting one person to the payment of another's tax. This Court in disposing of a similar question has stated:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income." *Hoeper* v. *Tax Commission, Wis.*, 284 U. S. 206, 215.

POINT V.

Having Been Determined to be Corpus and An Estate Tax Having Been Paid Thereon the Amount in Question Should Not Be Subjected to An Income Tax.

The Commissioner was correct in determining that the property in question was corpus as it cannot be disputed that the interest of the estate in the partnership was an asset of the estate. The Commissioner determined the value thereof and such amount represented the value of decedent's interest in the partnership, which was clearly as much a part of the corpus of his estate as any other property, tangible or intangible, real or personal, which the decedent owned at the time of his death.

The Revenue Act of 1918, Section 402, provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." Thus, by statutory definition, the partnership interest was part of the corpus of the decedent's estate. It was subject to the payment of charges against his estate; it was subject to the expenses of administration of his estate; and it was subject to distribution as part of his estate.

Having once been properly classed as corpus, the asset in question could not be classed as income and any profit upon the sale or liquidation thereof is limited to the excess of the value at the time of death, as determined by the Commissioner. *Burnett* v. *Logan*, 283 U. S. 404, 413, 414.

> *"When, therefore, an item is properly determined to constitute a part of the gross estate of a decedent for estate tax purposes, it cannot by any sort of reasoning be made to constitute a part of the income of the same estate. It is a part of the corpus."* Nichols v. United States, 64 Ct. Cls. 241, 245.

To further subject the amount to the payment of an income tax would amount to double taxation, against which there exists a strong presumption, except where the language of the statute clearly calls for such double taxation. Said the Court in *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, pp. 195, 196:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, *i. e.*, an income tax and an estate tax. Such a duplication even in an exigent war tax measure is to be avoided unless required by express words."

The Government in its brief in opposition states that there is clearly no objectionable double tax, because of the fact that the estate tax and the income tax are levied upon different things and under different principles, citing *Waud* v. *United States*, 71 Ct. Cls. 567, 570. This statement of principle is entirely correct, but the principle was not applied in this case. The same thing has been taxed twice; the value of the decedent's interest in the partnership as part of the corpus of the estate, and the same value when liquidated and received as money, as income of the estate. It is because of this double levy on the same thing which was of unchanging value, that there is objectionable double taxa-

tion. The oppressiveness of double taxation is aggravated here, because in computing the estate tax no deduction was made for income tax, and charitable contributions to the extent of $127,019.54 were never deducted.

POINT VI.

The Amount, Being the Value of Property Received by Bequest, May Not Be Taxed as Income Because of Statutory Exemption.

Section 213 (b) (3) of the Revenue Act of 1918 provided that "the value of property acquired by gift, bequest, devise or descent" shall not be considered as gross income. The value of the petitioner's testator's interest in the partnership of A. H. Bull & Company was the value of property acquired by bequest.

Upon the testator's death, his interest in the partnership, together with all other personal property belonging to him, vested in his executor; but, at the same time, the right to receive this property vested in the legatees named in his will, and therefore, the value of the partnership interest, the same as any other personal property interest passing under the will, came to the legatees by bequest. *Brewster* v. *Gage*, 280 U. S. 327, 335.

The respondent in the court below contended that the property was not received by bequest, because title to it first vested in the executors. There is nothing on which to postulate this contention, as is shown by the decision in *Brewster* v. *Gage, supra*, wherein the Court through Mr. Justice Butler said:

> "The decree of distribution confers no new right; it merely identifies the property remaining, evidences the right of possession in the heirs, or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

The exemption provided by the statute is clear and any attempt to narrow the exemption has been condemned by this Court. In *Burnett v. Whitehouse*, 283 U. S. 148, the Court speaking through Mr. Justice McReynolds, said at page 151:

> "The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219."

To say that the amount in question was not the value of property received by bequest is to disregard substance and give undue importance to form. It amounts to stating that beneficiaries do not own property, the naked title to which is temporarily in a trustee.

In *Burnett* v. *Logan*, 283 U. S. 404, this Court had under consideration a very similar question. In that case the taxpayer had received under her mother's will, a right to share in the possible proceeds of a contract to pay indefinite sums, which were part payment for shares of stock which had been sold, partly for cash and partly for the said payments. For Estate tax purposes the value of this contract was assumed to be $277,164.50, and the transfer was taxed at that rate. The Commissioner attempted to levy an income tax on the amounts received as further payments under this contract. The Court held that there was no income until the value placed upon the contract for Estate tax purposes had been received, saying, through Mr. Justice McReynolds, at pages 413, 414:

> "From her mother's estate Mrs. Logan obtained the right to share in possible proceeds of a contract thereafter to pay indefinite sums. The value of this was assumed to be $277,164.50 and its transfer was so taxed. Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have

been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See *Burnett* v. *Whitehouse*, *ante*, p. 148."

CONCLUSION.

The amount which the estate received was received in payment for the acquisition of a capital asset and never was income of the estate. The amount the estate received was the value of property received by bequest and as such it was expressly exempted from being included in gross income.

It is respectfully submitted that the decision of the Court of Claims is erroneous and should be reversed.

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